No. 85-1385

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION, GENERAL DYNAMICS LAND SYSTEMS, INC. (formerly called Stromberg-Carlson Corporation), DATAGRAPHIX, INC., MATERIAL SERVICE CORPORATION and MARBLEHEAD LIME COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 28.1

Respondents have the following affiliated corporations, companies and partnerships: Lachmar Partnership; Mansour-G.D. Ltd.; Mines SNA, Inc./SNA Mines, Inc.; Etudes Techniques et Constructions Aerospatiales, Societe Anonyme; Tusas Aerospace Industries, Inc.; and Continental Cement Company. Respondents have no other parent corporation and no other subsidiary which is not wholly owned.

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Respondents submit this supplemental memorandum pursuant to Rule 22.6 of the Rules of this Court.

1. After the filing of respondents' brief in opposition, this Court heard oral argument in *United States v. Hughes Properties, Inc.*, No. 85-554. That case involves the timing of a deduction under the "all events" test for

progressive jackpots which are on slot machines, but have not yet been won, at year-end. At oral argument, the government made several statements which undercut arguments made by the government in the instant case, and, further, which demonstrate that this case will not be affected even if *Hughes Properties* were to be decided adversely to that taxpayer.

2. In *Hughes Properties*, the government argued that no fixed liability existed at year-end because no one had won the jackpot; thus, there was no specific obligee; and there "[was] no one in the world who could [at year-end] assert any possible claim to those funds." (Tr. 11.)* The government further argued that the absence of someone to enforce the jackpot liability in the event of the casino's bankruptcy or termination of business proved the absence of any present, fixed obligation. (Tr. 14-17.) Finally, the government contended that the jackpot on the machine was merely an open offer for which no deductible liability existed until the offer was accepted, that is, until the jackpot was won. (Tr. 20.)

3. The instant case is wholly dissimilar. Here, there is no lack of obligees because employees have accepted the "offer" made in the medical benefits plan by visiting their physicians and receiving covered medical benefits before year-end. The respondents are obligated to pay these employees, and their claims would be enforceable in a bankruptcy proceeding or if the respondents ceased doing business.

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* "Tr." refers to the transcript of the oral argument in *Hughes Properties*.

4. In the courts below, the government objected that respondents did not know the identities of each such employee at year-end, but the government conceded in *Hughes Properties* that knowledge of the identity of the obligees was not required under the "all events" test. (Tr. 11-12.) In *Hughes Properties*, the government also acknowledged that payment does not have to be currently due in order to be deductible (Gov't R. Br., No. 85-554 at 8), and that a deduction must be allowed despite the fact that some future event might relieve a taxpayer from actually paying a presently fixed liability (Tr. 15, 23-24).

5. In view of these concessions, the government is now left to argue that the deduction at issue in the case at bar cannot be allowed solely because claim forms must be filed and processed before payment is actually made. The cases establish that the necessity for the performance of ministerial acts cannot suffice to transform deductible, presently fixed liabilities into non-deductible, contingent liabilities. *United States v. Anderson*, 269 U.S. 422 (1926); *Continental Tie & Lumber Co. v. United States*, 286 U.S. 290 (1932). The facts pertaining to claims processing were fully explored in this case, and both courts below held that the processing was ministerial. (Appendix to Petition for Certiorari at 1a, 11a-12a.) Review by this Court to determine whether the findings of fact of both courts below were clearly erroneous is not warranted.

6. In sum, the case at bar is clearly distinguishable from *Hughes Properties* and could not be affected by any decision which this Court might render in that case if adverse to that taxpayer. In addition, the judgment below in the case at bar is correct and fully comports with this Court's prior decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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